PENASCO VALLEY TELEPHONE COOPERATIVE, INC.

IBLA 80-529 Decided June 26, 1981

Appeal from decision of the Roswell District Office, New Mexico, Bureau of Land Management, requiring payment of trespass administrative costs and trespass fees for unauthorized construction of buried telephone cables. 6-047, 6-053, 6-055, and 6-056.

Affirmed in part; vacated and remanded in part.

1. Regulations: Applicability -- Rights-of-Way: Generally -- Rights-of-Way: Nature of Interest Granted -- Rights-of-Way: Revised Statutes Sec. 2477

   Where regulations allowed the grantee of a highway right-of-way granted pursuant to sec. 8 of the Act of July 26, 1866, 43 U.S.C. § 932 (1976), otherwise known as R.S. § 2477, to authorize within its highway right-of-way a right-of-way for "facilities usual to a highway," a subsequent regulation change properly limited that highway grant to require one seeking, after the effective date of that regulation, a right-of-way for buried telephone cables to apply to the Bureau of Land Management for authorization.

2. Regulations: Applicability -- Rights-of-Way: Generally -- Rights-of-Way: Federal Highway Act -- Rights-of-Way: Nature of Interest Granted

   Where regulations allowed the grantee of a highway right-of-way pursuant to sec. 17 of the Federal Aid Highway Act of 1921, 23 U.S.C. § 317 (1976), to authorize within its highway right-of-way a right-of-way for "facilities usual to a highway," a subsequent regulation change

properly limited that highway grant to require one seeking, after the effective date of the regulation, a right-of-way for buried telephone cables to apply to the Bureau of Land Management for authorization.

3. Trespass: Generally -- Trespass: Measure of Damages

Where BLM assesses trespass damages based on the reasonable value, extent, and duration of an unauthorized use of the public lands, this assessment will not be disturbed unless the trespasser submits convincing evidence that it is incorrect; however, upon review where it is determined that damages were not properly calculated, the case may be remanded for recalculation of the trespass charges.

APPEARANCES: George A. Graham, Jr., Esq., Artesia, New Mexico, for appellant; John H. Harrington, Esq., Office of the Solicitor, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Penasco Valley Telephone Cooperative, Inc., has appealed from a decision of the Roswell District Office, New Mexico, Bureau of Land Management (BLM), dated February 28, 1980, requiring appellant to pay the administrative cost of initiation of trespass proceedings, pursuant to trespass notices 6-047, 6-053, 6-055, and 6-056, and imposing trespass fees. 1/

The dispute centers on the construction of buried telephone cables by appellant within the boundaries of highway rights-of-way previously granted to the State of New Mexico and one of its counties, Eddy. It is the position of BLM that pursuant to sections 302 and 501 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1734, 1761 (1976), appellant was required to obtain a right-of-way before laying its cables and that, not having done so, appellant was in trespass. Appellant, on the other hand, maintains that it was not required to obtain such a right-of-way from BLM but was required only to obtain the consent of the prior right-of-way grantees. 2/

1/ Two trespass notices were designated 6-047, one dated Oct. 24, 1979, and the other Dec. 21, 1979.
2/ While appellant has requested oral argument, we do not believe that such argument would materially contribute to the resolution of this appeal. The request is denied.

On March 19, 1952, the State of New Mexico was granted rights-of-way for U.S. Highway 285 and State Highway 137 pursuant to section 17 of the Federal Aid Highway Act of 1921, 23 U.S.C. § 317 (1976)). The State subsequently approved applications in the years 1977 and 1978 to permit appellant to use such rights-of-way for "utility facilities." On October 26, 1979, these permits were revoked by the State because they were "in violation of existing BLM regulations" requiring a prior BLM grant of a right-of-way.

Between 1959 and 1969, the county of Eddy established county roads 18, 119 A, 119 C, 119 H, and 119 I pursuant to section 8 of the Act of July 26, 1866, 43 U.S.C. § 932 (1976)), otherwise known as R.S. § 2477. In 1978 the county subsequently granted rights-of-way to appellant within the boundaries of its highway rights-of-way in order that appellant might bury its telephone cables. These rights-of-way were reaffirmed by the county on October 15, 1979, in full recognition of the conflict with existing BLM regulations.

For the sake of clarity of our decision, we will deal with the county and State highway rights-of-way separately.

County Highway Rights-of-Way

[1] Section 8 of the Act of July 26, 1866, supra, provides only that: "The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." 3/ The applicable regulation in effect at the time these county highway rights-of-way were established, 43 CFR 244.58(a) (1959), 4/ provided in part that:

> Grants of rights-of-way referred to in the preceding section become effective upon the construction or establishment of highways, in accordance with the State laws, over public lands, not reserved for public uses. No application should be filed under R.S. 2477, as no action on the part of the Government is necessary. Rights-of-way granted by R.S. 2477 do not include rights-of-way for facilities with respect to which any other provision of law specifically requires the filing of an application for a right-of-way. Where the holder of the highway right-of-way determines that such facility will not seriously impair

3/ This statute was repealed by section 706(a) of FLPMA, supra, effective Oct. 31, 1976, subject to "valid existing rights."

4/ 43 CFR 244.58(a) (1959) was subsequently renumbered (43 CFR 2234.2-5(b)(1)) but was substantially unchanged in content between 1959 and 1969. In 1970, the regulation was redesignated 43 CFR 2822.2-2(a). 35 FR 9646 (June 13, 1970).

> the scenic and recreational values of an area and its consent is obtained, the Department waives the requirement of an application for a right-of-way for all facilities usual to a highway along a highway right-of-way granted by R.S. 2477 * * *. [Emphasis added.]

On May 20, 1972, BLM proposed revisions to the highway right-of-way regulations. The basis for the proposed change was stated as follows (37 FR 10379):

> The purpose of this amendment is to delete those provisions of the Code of Federal Regulations whereby holders of highway rights-of-way granted title 23 U.S.C. and R.S. 2477 may grant other parties rights-of-way within the highway rights-of-way. Under the proposed amendment, such additional uses of highway rights-of-way would be granted by the Government. This would allow establishment of appropriate terms and conditions to protect environmental values within and outside the highway rights-of-way and assure an appropriate monetary return to the Government for the use of its property.
>
> It was proposed that 43 CFR 2822.2-2 be revised to read in pertinent part:
>
> A right-of-way granted pursuant to R.S. 2477 confers upon the grantee the right to use the lands within the right-of-way for highway purposes only. Separate application must be made under pertinent statutes and regulations in order to obtain authorization to use the lands within such rights-of-way for other purposes.

The proposed regulations were finalized on November 7, 1974, 39 FR 39440. The above-quoted language of 43 CFR 2822.2-2 was finalized without change. 5/

The Solicitor's Office, on behalf of BLM, directs our attention to the case of United States v. Oklahoma Gas & Electric Co., 318 U.S. 206 (1943), in which the Department granted to the State of Oklahoma a highway right-of-way across Indian allotted lands pursuant to section 4 of the Act of March 3, 1901, 25 U.S.C. § 311 (1976). Subsequently, the State permitted the company to construct and maintain rural electric service lines within the highway right-of-way. The United States sued the company charging that it illegally occupied the land. The court affirmed the dismissal of the complaint, stating:

5/ 43 CFR 2822.2-2 remained unchanged until July 1, 1980, when 43 CFR Part 2800 was completely revised effective July 31, 1980, pursuant to the authority of Title V of FLPMA. 45 FR 44518.

> Presumably Congress intended that this case be decided by reference to some law, but the Government has cited and we know of no federal statutory or common-law rule for determining whether the running of the electric service lines here involved was a highway use. These considerations, as well as the explicit reference in the Act [of March 3, 1901] to state law in the matter of "establishment" as well as of "opening" the highway, indicated that the question in this case is to be answered by reference to that [state] law, in the absence of any governing administrative ruling, statute, or dominating consideration of Congressional policy to the contrary. [Emphasis added.]

Id. at 210. The Court indicated that apparently the Secretary had not issued any regulation applicable to the case nor had he sought to resolve the problem by administrative ruling. Id. at 208, 210.

The Solicitor's Office argues that the extent of a highway right-of-way is governed by Federal law. It alleges that appellant's assertion, that under New Mexico law the State and county may authorize use of highway rights-of-way for telephone transmission lines, only applies if Federal law allows it to apply. The Solicitor's Office argues that the regulatilns in effect at the time of the grants to the county required the consent of the Department to allow appellant to bury its telephone cables and that such consent was never given. Appellant correctly points out that this interpretation of that language is erroneous. The regulation stated "[w]here the holder of the highway right-of-way determines that such facility will not seriously impair the scenic and recreational values of an area and its consent is obtained." (Emphasis added.) Clearly, "its consent" refers back to "holder of the right-of-way," in this case the county. If there could be any doubt of that interpretation, it was dispelled by the 1970 regulation change containing the same language quoted above and entitled, 43 CFR 2822.2-2(a), Consent of grantee to additional facilities within right-of-way. See n.2, supra.

The proper question for examination is whether the grants made to the county pursuant to R.S. § 2477 were subject to subsequent limitation by regulation. Appellant argues that the regulations in effect at the time of the grants are controlling and that the restrictions placed on R.S. § 2477 grants by the regulation changes in 1974 cannot limit the prior grants to the county.

There is nothing in the record to indicate the terms, if any, of the grants to the county. Therefore, we must examine whether the Department intended that the 1974 regulation be applied retroactively.

See 2 Am. Jur. 2d, Administrative Law § 311 (1962). 6/ When published in the Federal Register as proposed rulemaking and as final rulemaking in 1974, the intent of the Department appeared clear. Both existing R.S. § 2477 grants and future grants were to be so limited. The agency's intention is not totally controlling, however. There are limitations on permissive retroactive rulemaking and relevant factors for consideration include the degree of retroactivity, the need for administrative flexibility, and the hardship on affected parties. Tennessee Gas Pipeline Co. v. Federal Energy Regulatory Commission, 606 F.2d 1094, 1116 n.77 (D.C. Cir. 1979).

In this case, the R.S. § 2477 grants to the county were made in 1959, 1963, 1965, and 1969. The pertinent 1974 regulation change stated that R.S. § 2477 grants were to be only for highway purposes and that separate applications were necessary to obtain authorization to use the lands within such rights-of-way for other purposes. Even though the county received the highway rights-of-way prior to 1974, appellant's rights-of-way were not granted to it until the county issued a 25-year franchise to appellant on May 9, 1978.

Herein, we do not believe that retroactive application of the 1974 regulation to the R.S. § 2477 grants in question creates such a hardship on the county or on appellant as to outweigh the Government's interest, as expressed in the 1972 proposed rulemaking, to "allow establishment of appropriate terms and conditions to protect environmental values within and outside the highway rights-of-way and assure an appropriate monetary return to the Government for the use of its property."

State Highway Rights-of-Way

[2] Section 17(b) of the Federal Aid Highway Act of 1921, supra, provides only that "land [reasonably necessary for the right-of-way of any highway] and materials may be appropriated and transferred to the State highway department, or its nominee, for such purposes and subject to the conditions so specified." The applicable regulations in effect at the time these State highway rights-of-way were established in 1952, 43 CFR 244.42-244.44, were silent concerning additional uses of a highway right-of-way. However, on July 1, 1952, the Department issued a regulation, 43 CFR 244.54(d), 17 FR 5905 (July 1, 1952), almost identical to 43 CFR 244.58(a), cited in the preceding section. It also provided for the establishment of highways "in accordance with the State laws."

In 1962 the language of 43 CFR 244.54(d) was revised and redesignated 43 CFR 244.56(a), 27 FR 6935 (July 21, 1962). That regulation read:

6/ Retroactive application of a regulation is not per se unlawful. Pasadena Hospital Ass'n, Ltd. v. United States, 618 F.2d 728, 735 (Ct. Cl. 1980). See SEC v. Chenery Corp., 332 U.S. 194, 203 (1947).

> (a) No application under the regulations of this part is required for a highway right-of-way granted pursuant to Title 23, United States Code, for facilities usual to a highway, except (1) where terms of the grant or a provision of law specifically requires the filing of an application for a right-of-way, (2) where the right-of-way is for electric transmission facilities which are designed for operation at a nominal voltage of 33 KV or above or for conversion to such operations, or (3) where the right-of-way is for oil or gas pipelines which are part of a pipeline crossing other public lands, or if not part of such a pipeline, which are more than two miles long. When an application is not required under the provisions of this paragraph, qualified persons may appropriate rights-of-way for such usual highway facilities with the consent of the holder of the highway right-of-way, which holder will be responsible for compliance with § 244.9 in connection with the construction and maintenance of such facilities. [Emphasis added.]

In 1964, the regulation was renumbered as 43 CFR 2234.2-4(c)(1) without substantive change. 29 FR 1970 (Mar. 31, 1964). Again, in 1970 there was a redesignation. Regulation 43 CFR 2821.6, Additional rights-of-way within highway rights-of-way was created; however, no text followed. Instead, 43 CFR 2821.6-1, General was promulgated containing the same language as 43 CFR 2234.2-4(c)(1).

In 1972, BLM proposed the revisions to the right-of-way provisions as discussed, supra, indicating an intent to delete those provisions whereby holders of rights-of-way granted under title 23 U.S.C. and R.S. § 2477 could grant to other parties rights-of-way within the highway rights-of-way. However, both the proposed rulemaking and final rulemaking indicated that 43 CFR 2821.6, which contained no text, was being revised. When published in final, 43 CFR 2821.6, 39 FR 39440 (Nov. 7, 1974), read:

> § 2821.6 Additional rights-of-way within highway rights-of-way.
>
> A right-of-way granted under this subpart confers upon the grantee the right to use the lands within the right-of-way for highway purposes only. Separate application must be made under pertinent statutes and regulations in order to obtain authorization to use the lands within such rights-of-way for other purposes. Additional rights-of-way will be subject to the highway right-of-way. Future relocation or change of the additional right-of-way made necessary by the highway use will be accomplished at the expense of the additional right-of-way grantee. Prior to

> the granting of an additional right-of-way the applicant therefor will submit to the Authorized Officer a written statement from the highway right-of-way grantee indicating any objections it may have thereto, and such stipulations as it considers desirable for the additional right-of-way.

Unfortunately, the conflicting language of 43 CFR 2821.6-1 was not deleted. While the Department clearly intended to delete the language of 43 CFR 2821.6-1 and substitute the new language of 43 CFR 2821.6, it failed to do so. 7/ However, it does not appear that the State relied on the language in 43 CFR 2821.6-1. In fact, the State was apparently advised of the new requirement that application to BLM was necessary. 8/ The approval granted by the State for the rights-of-way in question was given after the 1974 regulation change.

We are compelled to hold that the State approval was insufficient in light of the 1974 regulation change, despite the conflicting language of 43 CFR 2821.6 and 2821.6-1, and that approval should have been sought from BLM. The basis for this conclusion is our rationale set forth above concerning the retroactive application of such rulemaking.

7/ 43 CFR 2821.6 and 43 CFR 2821.6-1 remained unchanged until July 1, 1980, when 43 CFR Part 2800 was completely revised effective July 31, 1980, pursuant to the authority of Title V of FLPMA. 45 FR 44518.

8/ In a letter to counsel for appellant dated Oct. 26, 1979, canceling appellant's right-of-way permits, the New Mexico State Highway Department explained:

"On May 20, 1972, the Bureau of Land Management had a proposed regulation printed in the federal register. Portions of this new regulation required application for permits on all BLM lands, including highways used by the State Highway Department. On November 7, 1974, this regulation became effective and we were advised by the BLM that after that date any utilities or permits requested on State highway right of way would first have to receive permits or New Mexico grant numbers from the BLM prior to our issuing permits for these utilities or other construction.

"Numerous permits were issued to Penasco Valley Telephone Co-op over the past two years. Some of these permits covered construction on BLM owned or controlled land. A list of these permits follows: [including permits for construction along U.S. Highway 285 and State Highway 137.]

* * * * * * *

"Since the above permits were issued in violation of existing BLM regulations, we have no recourse but to advise you that all 15 above listed permits are hereby declared null and void.

"We have talked with James O'Conner of BLM who has advised us that Penasco Valley Telephone Co-op could request a blanket permit to cover this entire construction project. This would save time for all concerned. We strongly recommend this procedure be followed." (Emphasis added.)

Having determined that, pursuant to the regulations, appellant should have sought authorization from BLM for burial of its telephone cables, we turn to the question of trespass.

[3] Appellant argues that the trespass notices in question are defective because they do not cite applicable statutes or regulations. The statutes cited are sections 301 and 501 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1732, 1761 (1976). Those sections generally require management of the public lands and authorize the granting of rights-of-way. The cited regulations are 43 CFR 2822.2-2, relating only to R.S. § 2477 grants, and 43 CFR 9230, the trespass regulations. Appellant correctly points out that 43 CFR 2822.2 has no applicability to Title 23 highway rights-of-way.

At the time the notices were issued, the proper regulation to have been cited by BLM was 43 CFR 2801.1-4. 9/ It provides that "[a]ny occupancy or use of the lands of the United States without authority will subject the person occupying or using the land to prosecution and liability for trespass." Where there has been unauthorized use of public lands, BLM may assess damages against the trespasser and serve it with a demand for payment thereof, prior to turning the matter over to the Department of Justice for initiation of judicial proceedings. Outdoor Adventure River Specialists, Inc., 41 IBLA 132 (1979); Gold Mountain Logging Co., 34 IBLA 326 (1978). The measure of damages for trespass is set forth in 43 CFR 9239.0-8 and is applicable in this case. See Mountain States Telephone & Telegraph Co., 35 IBLA 154 (1978).

We cannot find that appellant was prejudiced by the failure of BLM to cite 43 CFR 2801.1-4 in the notices. At all times after October 2, 1979, appellant was aware of BLM's position concerning appellant's actions in burying the telephone cables without BLM's authorization. 10/

Ordinarily, where BLM assesses trespass damages based on the reasonable value, extent, and duration of an unauthorized use of public lands, the assessment will not be disturbed unless the trespasser submits convincing evidence that it is incorrect. Reed Z. Asay, 55 IBLA 157 (1981); Outdoor Adventure River Specialists, Inc., supra. In this case while appellant has not objected to the amount assessed by BLM for the trespass, our examination of the trespass assessment reveals that it was not properly calculated. 11/

9/ In the revision to 43 CFR Part 2800, 45 FR 44518 (July 1, 1980), effective July 31, 1980, this regulation was renumbered 43 CFR 2801.3 and the text of the regulation was expanded.

10/ See copy of letter in case record from the Roswell District Manager BLM, to appellant, dated Oct. 5, 1979, confirming BLM's "position stated by Michael Moran of my staff at a meeting at your office on October 2, 1979."

11/ We will not disturb the the amount assessed by BLM for administrative cost. Recovery for that expense is clearly authorized by section 304 of FLPMA, 43 U.S.C. 1734 (1976).

43 CFR 9239.0-8 provides that the measure of damages for trespass "will be the measure of damages prescribed by the laws of the State in which the trespass is committed, unless by Federal law a different rule is prescribed or authorized." We know of no Federal law prescribing a measure of damages in a case such as this. Therefore, we must turn to the law of the State of New Mexico. Our review of that law indicates that the law provides little guidance as there appears to be no settled rule for determining the measure of damages.

For that reason, the use of rental value by BLM in this case for determining trespass fees was not improper. See Gold Mountain, Inc., supra at 328; see also 75 Am. Jur. 2d., Trespass § 51 (1974). We note, however, that in calculating the trespass damages BLM assumed a right-of-way 30 feet wide. See memorandum from Chief, Appraisal Staff to District Manager, Roswell, dated February 21, 1980. We find this to be erroneous. A right-of-way 10 feet wide would appear to be more than sufficient for buried telephone cable. In addition, the February 21, 1980, memorandum indicated that other buried telephone cable rights-of-way acquired in Eddy County were 10 feet wide.

Therefore, we must vacate the BLM decision as to the assessment of trespass fees and remand the case for recalculation of the fees based on a 10-foot right-of-way.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed in part and vacated and remanded in part.

Bruce R. Harris
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Anne Poindexter Lewis
Administrative Judge